Supreme Court, U.S.
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No. _____

In The
Supreme Court of the United States

SHAWN GEMENTERA,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Does the imposition of a condition of supervised release intended publicly to humiliate an offender by forcing him to stand in front of a United States Post Office wearing a sign board advertising his conviction violate the Sentencing Reform Act, 18 U.S.C. § 3583 *et seq.*?

Does the imposition of such a shaming condition violate the Eighth Amendment's prohibition of cruel and unusual punishments?

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OPINIONS BELOW

The published opinion of the Ninth Circuit Court of Appeals (App. 1-31) is reported at *United States v. Gementera*, 379 F.3d 596 (9th Cir. 2004) (Hawkins, J., dissenting).

The district court orally imposed at sentencing the condition of supervised release that is the subject of this petition (App. 32-40). The district court reconsidered its initial order and imposed an amended condition at a subsequent hearing, issuing a written order on that date specifically addressing the condition of supervised release in question (App. 47-64). Those orders are unreported.

STATEMENT OF JURISDICTION

The Ninth Circuit Court of Appeals entered its judgment on August 9, 2004. Petitioner thereafter requested and obtained an extension of time to file a petition for rehearing and/or petition for hearing en banc. The Ninth Circuit denied petitions for panel rehearing and for rehearing en banc in an order dated May 13, 2005 (App. 65). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

18 U.S.C. § 3583(d) provides, in relevant part:

Conditions of supervised release.

[Mandatory conditions of supervised release, not relevant to the instant petition.]

The court may order, as a further condition of supervised release, to the extent that such condition–

(1) is reasonably related to the factors set forth in 18 U.S.C. §§ 3553(a)(1), (a)(2)(B), (a)(2)(C), and (a)(2)(D);

(2) involves no greater deprivation of liberty than is reasonably necessary for the purposes set forth in 18 U.S.C. §§ 3553(a)(2)(B), (a)(2)(C), and (a)(2)(D); and

(3) is consistent with any pertinent policy statements issued by the Sentencing Commission pursuant to 28 U.S.C. § 994(a) any condition set forth as a discretionary condition of probation in 18 U.S.C. §§ 3563(b)(1) through (b)(10) and (b)(12) through (b)(20), and any other condition it considers to be appropriate.

* * *

The Eighth Amendment to the United States Constitution provides:

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

STATEMENT OF THE CASE

On November 27, 2001, the United States filed a two-count indictment in the Northern District of California charging defendant Gementera and co-defendant Andrew Choi with mail theft (18 U.S.C. § 1708) and receipt of a stolen United States Treasury check (18 U.S.C. § 641). On

May 21, 2002, defendant entered a guilty plea to count one. On February 25, 2003, the district court sentenced defendant to a term of two months' incarceration and a period of three years' supervised release. Without prior notice to the parties, the district court imposed the following supervised release condition:

> And he shall perform 100 hours of community service under the direction of the probation officer that will include standing in front of a postal facility in the City and County of San Francisco for 100 hours with a sandwich board which in large letters declares quote: "I stole mail. This is my punishment."
>
> He shall report in to the postmaster of the facility who will keep time records to make sure that the defendant has complied with this directive.

(App. 38).

On March 3, 2003, defendant filed a motion to correct his sentence, pursuant to Federal Rule of Criminal Procedure 35. Defendant challenged the imposition of the sandwich board condition and proposed alternative supervised release conditions. The district court denied the Rule 35 motion, but reduced the number of hours it would require defendant to wear the sandwich board from 100 to eight.

Judgment was entered on March 4, 2003. Gementera appealed from the order imposing the shaming condition on the grounds that the condition violated both the Sentencing Reform Act (18 U.S.C. § 3583 *et seq.*) and the Eighth Amendment. The Office of the Federal Public Defender for the Northern District of California submitted a brief as *amicus curiae*, urging reversal of the shaming

condition. On August 9, 2004, a majority of the panel affirmed the district court's imposition of the shaming condition. Circuit Judge Michael Daly Hawkins authored a dissenting opinion.

Gementera subsequently sought and obtained a thirty-day extension of time, to and including September 22, 2004, to request panel rehearing and/or rehearing en banc. A consortium of law professors received the consent of the parties and approval of the Ninth Circuit to submit a brief as *amicus curiae*, supporting Gementera's petition for review and/or rehearing en banc (App. 66-70). Timely petitions requesting panel rehearing and for rehearing en banc were denied in a Ninth Circuit order issued on May 13, 2005. Judge Hawkins would have granted panel rehearing. After a judge of the Ninth Circuit requested a vote on whether to rehear en banc, the matter failed to receive a majority of the votes of the non-recused active judges.

With its submission ninety days from the date of that order, the instant petition is timely before this court.

STATEMENT OF FACTS

A. The Underlying Facts.

The following is a summary of the essential facts underlying defendant's conviction for mail theft, as set forth in the majority opinion of the Ninth Circuit panel (*United States v. Gementera*, 379 F.3d 596 (9th Cir. 2004)): Shawn Gementera pilfered letters from several mailboxes along San Francisco's Fulton Street on May 21, 2001. A police officer who observed the episode immediately